



DEPARTMENT OF COMMERCE  
AND CONSUMER AFFAIRS

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OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of	)	PCH-2003-5
	)	
STONERIDGE RECOVERIES, LLC,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND DECISION
vs.	)	
	)	
DEPARTMENT OF BUDGET AND	)	
FISCAL SERVICES, CITY AND	)	
COUNTY OF HONOLULU,	)	
	)	
Respondent.	)	
	)	

HEARINGS OFFICER'S FINDINGS OF  
FACT, CONCLUSIONS OF LAW, AND DECISION

I. INTRODUCTION

On March 25, 2003, Stoneridge Recoveries, LLC ("Petitioner"), filed a request for administrative review of the Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") March 20, 2003 denial of Petitioner's protest dated January 27, 2003. The matter was thereafter set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

The hearing commenced on August 24, 2004 and was concluded on October 19, 2004. Petitioner was represented by Mark S. Kawata, Esq. Respondent was represented by Amy R. Kondo, Esq. and Reid M. Yamashiro, Esq.

Prior to the conclusion of the hearing, the Hearings Officer directed the parties to file post-hearing memoranda. Petitioner filed its memorandum on November 19, 2004 and

Respondent filed its memorandum on December 3, 2004. A rebuttal memorandum was filed by Petitioner on December 13, 2004.

Having reviewed and considered the evidence and arguments presented by the respective parties at the hearing, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

## II. FINDINGS OF FACT

1. In or about May 2002, Respondent issued a Notice to Bidders and Proposal Document No. 13878 ("IFB") to solicit bids for the furnishing of motor vehicle towing services for zones designated as I-II, III-IV-V, VI, VII, VIII, and IX, for a 60-month period beginning August 1, 2002 and ending July 31, 2007.

2. Pursuant to the terms of the IFB, contracts to provide the towing services for the respective zones would be awarded to the "responsible bidder offering the highest monthly premium payable to the City, whose storage lot(s) is within the contracted zone and whose bid conforms to the invitation for bids and will be most advantageous to the City."

3. The deadline to submit bids in response to the IFB and the opening of those bids was scheduled for June 12, 2002.

4. On June 12, 2002, Petitioner submitted bids in connection with tow zones III-IV-V and VI. Petitioner was the high bidder for tow zone VI and as such, was awarded the contract to provide towing services in that tow zone.

5. Tow zones III-IV-V cover and consist of the area from downtown Honolulu to Makapuu.

6. Petitioner was the apparent high bidder for tow zones III-IV-V, having bid \$21,000.00 per month.

7. By letter dated June 14, 2002, Respondent informed Petitioner that Petitioner "is being considered for the awards in Zones III-IV-V..." and that Petitioner was "required to have your principal place of businesses, tow vehicles and storage areas ready for inspection by the City's inspectors beginning the week of July 1, 2002."

8. Petitioner identified the lot located at 1830 Kapiolani Boulevard as its storage yard for tow zones III-IV-V.

9. The Kapiolani Boulevard lot was inspected but was not approved because the lot did not have proper zoning or a variance for use as a vehicle storage facility.

10. By letter dated July 11, 2002, Respondent notified Petitioner that its bid had been rejected.

11. By letter dated July 16, 2002, Petitioner protested Respondent's rejection of Petitioner's bid.

12. By letter dated July 31, 2002, Respondent upheld its decision to reject Petitioner's bid and denied Petitioner's protest.

13. On August 12, 2002, Petitioner filed a request for administrative review with the Office of Administrative Hearings, Department of Commerce and Consumer Affairs of Respondent's July 31, 2002 denial of Petitioner's protest. This matter was designated as PCH-2002-11.

14. On August 15, 2002, Respondent filed a motion to dismiss Petitioner's request for administrative review in PCH-2002-11, alleging that Petitioner's appeal was untimely.

15. On September 23, 2002, the Hearings Officer granted Respondent's motion and ordered that the matter (PCH-2002-11) be dismissed.

16. On October 1, 2002, Petitioner filed a Notice of Request for Judicial Review of the Hearings Officer's decision in PCH-2002-11 in the First Circuit Court. Petitioner's appeal was designated as *Stoneridge Recoveries, LLC v. Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii, S.P. No. 02-1-0447*.

17. On October 1, 2002, Petitioner lodged a second protest with Respondent over the rejection of its bid.

18. By letter dated October 31, 2002, Respondent informed Petitioner that because "the claims stated [in] your October 1, 2002 letter were previously raised in Stoneridge's earlier protest, it is precluded from attempting to relitigate the same issue by filing a new protest."

19. On November 8, 2002, Petitioner filed a request for administrative review of Respondent's October 31, 2002 decision in connection with the October 1, 2002 protest. This matter was designated as PCH-2002-14.

20. On November 29, 2002, Respondent filed a motion to dismiss Petitioner's request for administrative review in PCH-2002-14.

21. On December 18, 2002, the Hearings Officer granted Respondent's motion and ordered that the matter be dismissed.

22. On January 15, 2003, Petitioner filed a Notice of Request for Judicial Review of the Hearings Officer's decision in PCH-2002-14 in the First Circuit Court. Petitioner's appeal was designated as *Stoneridge Recoveries, LLC v. Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii, S.P. No. 03-1-0017*.

23. On January 23, 2003, Ivan Lui-Kwan, the then acting director of Respondent, approved a recommendation by Charles Katsuyoshi, Respondent's purchasing administrator, to cancel the IFB and resolicit bids for towing services for tow zones III-IV-V under revised bid requirements.

24. By letter dated January 24, 2003 to Petitioner's attorney, Respondent informed Petitioner that Respondent intended to resolicit bids for towing services for tow zones III-IV-V because "all of the bids received do not meet the bid requirements for providing a qualified storage lot to store vehicles."

25. By letter dated January 27, 2003, Petitioner protested Respondent's cancellation of the IFB.

26. On February 10, 2003, the parties stipulated to dismiss with prejudice Petitioner's administrative appeals designated as S.P. Nos. 02-1-0447 and 03-1-0017, both of which were pending in the First Circuit Court.

27. By letter dated March 20, 2003, Respondent denied Petitioner's January 27, 2003 protest.

28. On March 25, 2003, Petitioner initiated the present action by filing a request for administrative review of Respondent's March 20, 2003 denial.

29. On April 30, 2003, Respondent filed a motion for summary judgment in the present action.

30. Respondent's motion for summary judgment came on for hearing on May 30, 2003. Prior to the commencement of the hearing, the Hearings Officer raised the issue of the Hearings Officer's jurisdiction over this matter.<sup>1</sup> The parties were provided with an opportunity to submit legal memoranda on that issue and present oral argument. On June 9, 2003, the Hearings Officer heard argument on both the jurisdictional issue and the issues raised in Respondent's motion.

31. On June 26, 2003, the Hearings Officer issued his findings of fact, conclusions of law, and final order dismissing Petitioner's request for administrative review. The Hearings Officer concluded that the solicitation was not subject to Hawaii Revised Statutes ("HRS") Chapter 103D and that therefore the Hearings Officer lacked jurisdiction over the matter. In view of his conclusion, the Hearings Officer also determined that Respondent's motion for summary judgment was moot.

32. Both parties sought judicial review of the Hearings Officer's decision. By order dated January 29, 2004, the Circuit Court determined, among other things, that the Hearings Officer had jurisdiction over the matter pursuant to HRS Chapter 103D and as such, remanded the matter to the Hearings Officer for further proceedings.

33. On February 23, 2004, the Hearings Officer issued an order denying Respondent's motion for summary judgment. A notice setting the matter for hearing was also issued.

34. The hearing commenced on August 24, 2004 and was concluded on October 19, 2004. At the conclusion of the hearing, the parties were directed to file post-hearing memoranda addressing the issues raised by the parties. The Hearings Officer also raised and the parties were directed to address the question of Petitioner's standing to pursue this action.

### III. CONCLUSIONS OF LAW

If any of the following conclusions of law shall be deemed to be findings of fact, the Hearings Officer intends that every such conclusion of law shall be construed as a finding of fact.

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<sup>1</sup> The Hearings Officer questioned the applicability of HRS Chapter 103D to this case.

At the outset, the Hearings Officer must determine whether or not Petitioner has standing to litigate the cancellation of the solicitation under HRS Chapter 103D. It is well-settled that every court must determine as a threshold matter whether it has jurisdiction to decide the issue presented. *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 903 P.2d 1246 (1995). In that regard, because standing is a jurisdictional requirement, it cannot be waived and may be brought up at any time during a proceeding. Moreover, the Hearings Officer is obligated<sup>2</sup> to *sua sponte* address the issue of standing even when the parties fail to raise the issue. See *Akinaka v. Disciplinary Board of the Hawaii Supreme Court*, 979 P.2d 1077 (1999); *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et. al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et. al*, PCH 99-2 and PCH 99-3 (consolidated) (April 16, 1999). Parties cannot confer jurisdiction on the Hearings Officer directly or indirectly where it is otherwise lacking. See generally, *State of West Virginia v. Thomas A. Bedell*, 602 S.E.2d 542 (2004).

HRS §103D-701(a) states in relevant part:

*Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation.*

And HRS §103D-709(a) provides the Hearings Officers with jurisdiction to: review and determine de novo any request from any *bidder, offeror, contractor or governmental body aggrieved* by a determination of the chief procurement officer, head of a purchasing agency, or a designee of either officer under sections 103D-310, 103D-701 or 103D-702.

(Emphasis added).

Thus, in order to qualify as a party with standing to file a request for an administrative hearing under HRS Chapter 103D, Petitioner must be an “actual or prospective bidder, offeror, or contractor” as set forth in HRS §103D-701(a). See *Browning Ferris Industries et al. v. County of Kauai*, PCH-96-11 (January 29, 1997). Indeed, the rights and remedies created under HRS Chapter 103D were intended for and are available

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<sup>2</sup> Like courts. Hearings Officers are under an independent obligation to police his or her own jurisdiction.

only to those who participated in or still have a realistic expectation of submitting a bid in response to the IFB. See *Hawaii School Bus Assn v. DOE*; PCH-2003-3 (May 16, 2003).

In *Hawaii Newspaper Agency, et. al., v. State Dept. of Accounting & General Services, et. al. and Milici Valenti Ng Pack v. State Dept. of Accounting & General Services, et. al, supra*, Milici protested the rejection of its proposal. The rejection was based on the fact that the proposal had been submitted after the deadline set forth in the solicitation. The Hearings Officer held that Milici's proposal had been properly rejected as late and that the resulting protest, brought approximately two months after the rejection of its proposal, was untimely. In addressing the issue of Milici's standing, the Hearings Officer concluded that:

Milici could no longer be considered an "offeror" for purposes of HRS §103D-701(a) after its proposal was rejected and returned and once the deadline for the submission of proposals passed. Nor could Milici qualify as a "prospective offeror".

In *MCI Telecommunications Corp. v. United States*, 878 F.2d 362 (Fed Cir. 1989), it was stated that in order to qualify as a prospective bidder, one who has not actually submitted an offer must be expecting to submit an offer prior to the closing date of the solicitation; and that once the date for submission passed, the would-be protestor can no longer realistically expect to submit a bid on the proposed contract and therefore, cannot achieve prospective bidderhood with regard to the original solicitation. (citation omitted). The holding of *MCI Telecommunications Corp.* is persuasive.

In the case at hand, Milici no longer had any realistic expectation of submitting a proposal in response to the RFP once the submission deadline expired and the time for protesting the rejection of its proposal passed. At that point, Milici could no longer be considered an "offeror" or "prospective offeror." Moreover, under HRS §103D-701(a), standing to protest is conferred upon any "actual or prospective bidder, offeror, or contractor *who is aggrieved in connection with the solicitation or award of a contract.*" (emphasis in original). Because Milici no longer had any realistic expectation of submitting a proposal and being awarded the contract, it was not an "aggrieved" party when the contract was subsequently awarded to RFD. Thus, *having failed to file a timely protest to the rejection of its*

*proposal, Milici lacked standing to challenge Respondent's subsequent award of the contract.*

(Emphasis added).

In the present case, the bids submitted in response to the IFB were opened on June 12, 2002 and Petitioner was determined to be the apparent high bidder. Nevertheless, on July 11, 2002, Respondent notified Petitioner that its bid had been rejected. Petitioner responded by protesting Respondent's rejection of Petitioner's bid and on July 31, 2002, Respondent denied the protest. Thereafter, Petitioner filed for an administrative review of Respondent's denial (PCH-2002-11) and on August 15, 2002, Respondent moved the Hearings Officer to dismiss Petitioner's request for review as untimely. Respondent's motion was granted on September 23, 2002 and the matter (PCH-2002-11) was ordered dismissed. Petitioner then sought judicial review of the Hearings Officer's dismissal in PCH-2002-11.

While judicial review of the Hearings Officer's dismissal was pending, Petitioner submitted a second protest to Respondent on October 1, 2002 over the rejection of its bid. That protest was denied by Respondent on October 31, 2002. According to Respondent, because "the claims stated [in Petitioner's] October 1, 2002 letter were previously raised in Stoneridge's earlier protest, [Petitioner] is precluded from attempting to relitigate the same issue by filing a new protest." On November 8, 2002, Petitioner filed a request for administrative review of Respondent's October 31, 2002 decision (PCH-2002-14) and on November 29, 2002, Respondent filed a motion to dismiss Petitioner's request for administrative review. Respondent's motion was granted on December 18, 2002 and the matter (PCH-2002-14) was ordered dismissed. On January 15, 2003, Petitioner sought judicial review of the Hearings Officer's decision.

Thereafter, on February 10, 2003, the parties stipulated to dismiss with prejudice the appeals of both PCH-2002-11 and PCH-2002-14. As a result of the dismissals, Respondent's earlier rejection of Petitioner's bid remained intact and Petitioner's involvement in the solicitation was effectively terminated.<sup>3</sup> Consequently,

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<sup>3</sup> The procurement code does not provide a right of action to those not involved in the bidding and procurement process. *Concerned Taxpayers of Brunswick County, et al., v. County of Brunswick*, 455 S.E.2d 712 (Va. 1995).



Petitioner could no longer be considered an actual bidder. Nor could Petitioner qualify as a prospective bidder as the time to submit bids had long expired. And, because Petitioner no longer had any realistic expectation of submitting a proposal and being awarded the contract, it was not an "aggrieved" party. *See generally, In the Appeal of Branch Office Supply, No. 2372 (MSBCA November 25, 2003) (third lowest bidder who would not be eligible for award if award to winning bidder was overturned, lacks standing).* For these reasons, the Hearings Officer must conclude that Petitioner lacks standing to maintain the present action challenging Respondent's cancellation of the solicitation.<sup>4</sup> Moreover, even if the Hearings Officer found the cancellation of the solicitation to be improper, Petitioner would not be entitled to the remedy it seeks to wit, award of the contract. As the court in *Concerned Taxpayers of Brunswick County* explained:

The Procurement Act also provides remedies for individuals or entities who have been denied rights conferred by the Act . . . *These sections permit only bidders, offerors, and contractors, within the meaning of the Act, to invoke those remedies by protesting an award, initiating administrative procedures, or bringing an action to challenge a decision to award a contract.*

(Emphasis added).

In light of the Hearings Officer's decision, a determination of the propriety of the cancellation of the IFB is unnecessary.

#### IV. DECISION

Based upon the foregoing findings and conclusions, the Hearings Officer orders that this matter be and is hereby dismissed and that each party bear its own attorney's fees, costs, and expenses.

Dated at Honolulu, Hawaii: JAN 19 2005

  
\_\_\_\_\_  
CRAIG H. UYEHARA  
Administrative Hearings Officer  
Dept. of Commerce and Consumer Affairs

<sup>4</sup> Any other conclusion would effectively resurrect Petitioner's untimely protest in PCH-2002-11.



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OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of	)	PCH-2003-5
	)	
STONERIDGE RECOVERIES, LLC,	)	HEARINGS OFFICER'S
	)	FINDINGS OF FACT,
Petitioner,	)	CONCLUSIONS OF LAW,
	)	AND FINAL ORDER
vs.	)	DISMISSING PETITIONER'S
	)	REQUEST FOR REVIEW
DEPARTMENT OF BUDGET AND	)	
FISCAL SERVICES, CITY AND	)	
COUNTY OF HONOLULU,	)	
	)	
Respondent.	)	
	)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS OF LAW,  
AND FINAL ORDER DISMISSING PETITIONER'S REQUEST FOR REVIEW

The Hearings Officer having *sua sponte*, raised the issue of his jurisdiction over this matter, and Respondent City & County of Honolulu, Department of Budget and Fiscal Services ("Respondent") having filed a motion for summary judgment on April 30, 2003; and these matters having come on for hearing before the undersigned Hearings Officer on June 9, 2003; Amy R. Kondo, Esq. appearing for Respondent; and Mark S. Kawata, Esq. appearing for Petitioner Stoneridge Recoveries, LLC ("Petitioner"); and after due consideration of the motion and memoranda filed by the parties and the argument of counsel in light of the entire record in this matter, the Hearings Officer hereby sets forth the following Findings of Fact, Conclusions of Law, and Final Order.

I. FINDINGS OF FACT

1. Respondent issued a Notice to Bidders and Proposal Document No. 13878 ("Proposal") to solicit bid proposals to the City & County of Honolulu for the furnishing of motor vehicle towing services for various zones for a sixty-month period from August 1, 2002 to July 31, 2007.

2. The Proposal provided in pertinent part:

By submitting an offer, the undersigned bidder fully understands, agrees and accepts to provide all tow services, as requested by the Honolulu Police Department or any City and County Agencies, excluding Oahu Transit Service of the Department of Transportation Services, and that all such tow requests shall be considered a "contract tow" and shall be covered by the requirements of this bid, including the towing rates, whether the vehicle is towed to the tow Contractor's storage lot or to a location as directed by the owner/driver of the vehicle.

The undersigned bidder proposes and agrees to pay to the City a premium, on a monthly basis payable in advance on or before the first working day of each and every month, for the exclusive right to provide towing services in each respective zone, as set forth below.

3. By letter dated July 11, 2002, Respondent notified Petitioner of Respondent's rejection of Petitioner's bid.

4. By letter dated July 16, 2002, Petitioner protested the rejection of its bid.

5. By letter dated July 31, 2002, Respondent notified Petitioner that Respondent was upholding its decision rejecting Petitioner's bid.

6. On August 12, 2002, Petitioner filed a request for review. Petitioner's request was designated as PCH-2002-11.

7. On August 15, 2002, Respondent filed a motion to dismiss Petitioner's request for review.

8. On September 23, 2002, the Hearings Officer issued a decision granting Respondent's motion to dismiss in PCH-2002-11.

9. By letter dated October 1, 2002, Petitioner submitted another protest to Respondent. By letter dated October 31, 2002, Respondent denied the protest.

10. Petitioner filed a request for review on November 8, 2002. Petitioner's request was designated as PCH-2002-14.

11. On November 29, 2002, Respondent filed a motion to dismiss Petitioner's request for review.

12. On December 18, 2002, the Hearings Officer issued an order granting Respondent's motion to dismiss in PCH-2002-14.

13. Thereafter, Respondent decided to cancel the bid solicitation and re-solicit the contract.

14. By letter dated January 27, 2003, Petitioner protested Respondent's cancellation of the solicitation.

15. By letter dated March 20, 2003, Respondent denied Petitioner's protest. On March 25, 2003, Petitioner filed a request for review in the instant case.

16. On April 30, 2003, Respondent filed a motion for summary judgment in this proceeding.

17. Prior to the commencement of the hearing on Respondent's motion for summary judgment on May 30, 2003, the Hearings Officer raised the issue of his jurisdiction over this matter. The parties were provided with an opportunity to submit legal memoranda on the issue. On June 9, 2003, the Hearings Officer heard oral argument on both the jurisdictional issue and Respondent's motion for summary judgment.

## II. CONCLUSIONS OF LAW

Administrative agencies are tribunals of limited jurisdiction. Generally, they only have adjudicatory jurisdiction conferred on them by statute. Their jurisdiction is dependent entirely upon the validity and the terms of the statute reposing power in them. 2 *Am Jur 2d Administrative Law*, §275 (2<sup>nd</sup> Edition).

In this case, both Petitioner and Respondent assert that Hawaii Revised Statutes ("HRS") Chapter 103D is applicable to and governs the solicitation involved here and that therefore the Hearings Officer has jurisdiction over this matter pursuant to HRS §103D-709.

In *Waikiki Windriders/Hawaiian Ocean's Waikiki v. Department of Budget and Fiscal Services, City & County of Honolulu, PCH-2002-9 (July 26, 2002)*, the Hearings Officer had the opportunity to consider the applicability of HRS Chapter 103D to concession contracts. There, the respondent contended that because the dispute involved the solicitation of bids for *concession contracts*, the Hearings Officer lacked jurisdiction over the matter. The petitioner, on the other hand, argued that while the solicitation involved concession contracts, those contracts also constituted "procurement contracts", and were therefore subject to the provisions of HRS Chapter 103D. HRS §103D-102(a) provides in part:

This chapter shall apply to all *procurement contracts* made by governmental bodies whether the consideration for the contract is cash, revenues, realizations, receipts, or earnings, any of which the State receives or is owed; in-kind benefits; or forbearance . . . .

"Procurement" is defined as "buying, purchasing, renting, leasing, or otherwise acquiring any good, service, or construction." HRS §103D-104.

The Hearings Officer in *Waikiki Windriders/Hawaiian Ocean's Waikiki* noted that:

In 1993, the Legislature enacted HRS Chapter 103D ("Code"). To a large extent, the Code was based upon the American Bar Association's Model Procurement Code for State and Local Governments ("Model Code"). *Standing Committee Report No. S8-93, 1993 Senate Journal, at 39*. Not surprisingly, HRS §103D-102(a) incorporated most of the language used in §1-104(2) of the Model Code. Like §1-104(2), HRS §103D-102(a) provided that the Code would "apply to every expenditure of public funds irrespective of their source" . . . "under any contract".

In 1995, HRS §103D-102(a) was amended to its present version. Although the amendment deleted "every expenditure of public funds irrespective of their source", the underlying legislative history gives no indication that the Legislature sought to expand the application of the Code to cases other than those involving the expenditure of public funds. Rather, it suggests that the purpose of the Bill (H.B. 1834) was merely to "clarify and streamline the

provisions [of the Code] to achieve the objectives of cost-effectiveness and accountability which prompted its adoption.” *Standing Committee Report No. 811, 1995; House Journal.*

These considerations lead the Hearings Officer to conclude that the Code was originally applicable to and continues to be applicable to procurement contracts made by governmental bodies that *involve the expenditure of public funds* as consideration irrespective of whether those funds consist of cash, revenues, realizations, receipts, or earnings, “any of which the State receives or is owed; in-kind benefits; or forbearance”. According to this interpretation, the language in HRS §103D-102(a) upon which Petitioner relies (“consideration for the contract . . . which the State receives or is owed”), was intended to clarify the *source of the funds* used by the procuring agency as consideration for the contract rather than to expand the application of the Code to include concession contracts.

(Emphasis in original).<sup>1</sup>

A plain reading of the bid documents leads the Hearings Officer to conclude that the consideration for the contract involved in this solicitation is the payment to the City of a premium by the high bidder<sup>2</sup> in exchange for the exclusive right to provide towing services in specified zones. Indeed, the contract does not contemplate the expenditure of public funds by Respondent as consideration for the “buying, purchasing, renting, leasing, or . . . acquiring [of] any good, service, or construction”.

Petitioner argues that the contract resulting from the solicitation has a “component” that will involve the expenditure of public funds. According to Petitioner, the contract will, among other things, require Respondent to pay the contractor the sum of \$55.00 for each vehicle towed that is unclaimed and not purchased at a City-authorized auction. The towing charge that Petitioner refers to, however, is a charge that is fixed in the contract and

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<sup>1</sup> In affirming the Hearings Officer’s decision, the Circuit Court found that “the Hawaii Procurement Code, set forth in Chapter 103D of the Hawaii Revised Statutes (“HRS”), *which applies to procurement contracts involving the expenditure of public funds by a government agency*, does not apply to the solicitation and award of concessions of public property.” (emphasis added).

<sup>2</sup> According to HRS §103D-302(h), “the contract shall be awarded . . . to the *lowest* responsible . . . bidder . . .” (emphasis added). This evidences the Legislature’s intent to limit the application of HRS Chapter 103D to solicitations involving the expenditure of public funds based upon lowest bid.

not subject to bidding. Thus, while payment of the towing charge would amount to an expenditure of public funds, it clearly would not constitute the consideration for the contract.

Respondent attempts to distinguish *Waikiki Windriders/Hawaiian Ocean's Waikiki* from this case by pointing out that *Waikiki Windriders/Hawaiian Ocean's Waikiki* involved a concession on City property that was governed by HRS Chapter 102. This, however, is a distinction without significance here because the Hearings Officer's conclusion in the *Waikiki Windriders/Hawaiian Ocean's Waikiki* case was ultimately based on the finding that the contract did not involve the expenditure of public funds. As such, the Hearings Officer's conclusion in that case was not limited to concession contracts.<sup>3</sup>

Based on these considerations, the Hearings Officer must conclude that the solicitation involved here is not subject to the requirements of HRS Chapter 103D and accordingly, the Hearings Officer lacks jurisdiction over this appeal. Under the circumstances, the Hearings Officer further concludes that Respondent's motion for summary judgment is moot.

### III. FINAL ORDER

ACCORDINGLY, IT IS HEREBY ORDERED that this matter be and is hereby dismissed; each party to bear its own attorney's fees and costs.

DATED at Honolulu, Hawaii: JUN 26 2003

  
\_\_\_\_\_  
CRAIG H. UYEHARA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs

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<sup>3</sup> Respondent also argues that the Hearings Officer has jurisdiction over this case because the solicitation incorporated the procedures set forth in HRS Chapter 103D, and because Petitioner has not contested the applicability of HRS Chapter 103D here. It is, however, axiomatic that jurisdiction cannot be conferred upon an administrative agency by the parties before it. *2 Am Jur 2d Administrative Law*, §276 (2<sup>nd</sup> Edition).